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December 12, 2007

The Honorable Ross Johnson
Chairman
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Via Facsimile (916) 322-6440

Dear Chairman Johnson and Commissioners:

Re: Comments on Proposed Emergence Regulation 18413

The Commission and its staff are to be congratulated for working quickly to come up with proposed regulations to respond to last month's decision of the Ninth Circuit Court of Appeals in *California Pro-Life Council, Inc. v. Randolph*. The complexity of this task is highlighted by the fact that the proposed regulation under consideration at the Commission's December 13, 2007 meeting was not ready for publication until the afternoon of December 11, 2007. While there is a need for swift action, the Commission may be better served by allowing more time for public comment and reaction before adopting this proposal.

Of concern is the proposal's restriction of "event-based reporting" to only one type of nonprofit organization and the further restriction to only permit "event-based reporting" for independent expenditures.

The memorandum accompanying the proposal rightly points out that the regulation must first define the groups to which the regulation applies – in the language of the Ninth Circuit, "groups like CPLC." Memorandum at 2 n.2. Staff proposes to define this population as only including corporations that are organized under Section 501(c)(4) of the Internal Revenue Code. Yet the Ninth Circuit did not draw any distinctions based on the particular subdivision of Section 501(c) under which a group is organized, nor does such a distinction exist in the First Amendment. Instead, the Ninth Circuit described groups "like CPLC" as "multi-purpose" organizations. 2007 WL 3356716 at 12. The defining fact of constitutional significance for the Ninth Circuit is the CPLC's major purpose "is not the nomination or election of candidates or the passage or defeat of ballot measure, but rather to educate Californians." *Id.* at 4.

In the prior appeal, the Ninth Circuit also made plain that it was referring to a broader category than only those groups organized under Section 501(c)(4): "For California to regulate individuals or organizations like CPLC who engage in activities other than political advocacy, California must have a compelling interest, and the regulations imposed must be narrowly tailored to advance the relevant interest." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003).

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The current focus of the proposed regulation on Section 501(c)(4) organizations is too narrow.

Similarly, the proposed regulation draws a distinction between independent expenditures and direct contributions. Under the proposal, "event-based reporting" is available for independent expenditures but not direct contributions (major donors). Again, however, the Ninth Circuit did not note a distinction between direct contributions and independent expenditures. Indeed, the Ninth Circuit treats those two types of campaign payments as equivalent in its analysis. See 2007 WL 3356716 at 12. Instead, the critical distinction for the court whether the expenditure or contribution is for a ballot measure or a candidate. *Id.* The court found it significant that CPLC's activities were on behalf of ballot measures rather than candidates -- this was the distinction that doomed the California regulation at issue in the case.

The Commission should take the time to consider the proposed emergency regulation carefully and should solicit further input before taking action. In any event, the Commission should revise the proposed regulation to eliminate the distinction between Section 501(c)(4) organizations and other "individuals or organizations like CPLC who engage in activities other than political advocacy." The proposed regulation should also be revised to eliminate the distinction between independent expenditures and direct contributions.

Sincerely,

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